

1 THE HONORABLE RICHARD A. JONES
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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
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14 KENNETH JOHANSEN, on behalf of himself
15 and all others similarly situated,
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17 Plaintiff,

18 vs.

19 EFINANCIAL, LLC, a Washington Limited
20 Liability Company,
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22 Defendant.
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NO. 2:20-cv-01351-RAJ-BAT

**PLAINTIFF'S OBJECTION TO
REPORT AND RECOMMENDATION**

NOTED ON MOTION CALENDAR:
July 12, 2021

I. INTRODUCTION

The fact that Mr. Johansen did not consent to be called is undisputed. Despite having the burden of proof on the issue, Efinancial has not come forward with any competent evidence that Mr. Johansen consented on its website or otherwise. All Efinancial has submitted is a string of data regarding a website visit, but almost none of that data matches Mr. Johansen's correct information. On the other hand, Mr. Johansen has submitted sworn testimony under penalty of perjury that he did not visit the website. Under a proper application of the summary judgment standard, Efinancial's motion for summary judgment must be denied on these facts alone.

However, the magistrate judge turned the summary judgment standard on its head. Mr. Johansen’s sworn testimony was completely disregarded in favor of strained and illogical inferences in Efinancial’s favor. The “unreliability” of Efinancial’s own evidence was held against Mr. Johansen rather than the other way around.

The magistrate judge then went on to consider whether the safe harbor to the TCPA's Do Not Call provision would apply even if Mr. Johansen didn't consent. It was undisputed that Efinancial did not meet the explicit requirements to invoke that safe harbor. However, the magistrate judge reached the unprecedented conclusion that Efinancial did not have to comply with the statute simply because it represented in a declaration that it gathers consent before making any calls—an assertion contradicted by all other evidence in the record relating to consent. If the TCPA is to offer consumers any meaningful protection against unwanted telemarketing calls, compliance with the statute cannot be excused so easily.

II. LAW AND ARGUMENT

A. Mr. Johansen did not provide prior express consent to be called.

There are a multitude of errors in the magistrate judge’s analysis of the consent issue, but the most logical place to start is with a notion that underlies the entire report and recommendation—that Mr. Johansen playing along with Efinancial’s sales pitch is proof that he consented to be called. The magistrate judge did not understand why a consumer would stay on

1 the phone for 27 minutes with a telemarketer if they did not consent to be called. But the answer
 2 is simple. The TCPA provides for vicarious liability, and all potentially liable companies were
 3 not identified at the outset of the unlawful call.

4 Here, Efinancial identified itself, but it wasn't until much later in the sales pitch that the
 5 seller whose product was being pitched, Fidelity Life, was finally identified.¹ (See Doc. 28-1 pp.
 6 15-21.) Shortly after Fidelity Life was identified, Mr. Johansen began asking questions to
 7 investigate the relationship between Efinancial and Fidelity Life, including exploring whether
 8 Efinancial was an exclusive agent.² (*Id.*) In all, about 10 pages of the 28-page transcript are
 9 occupied by Mr. Johansen's investigation. Mr. Johansen states numerous times in the transcript
 10 that he *didn't request an insurance quote and didn't want an insurance policy*, and he even
 11 testified under penalty of perjury that those statements were true, yet the magistrate judge found
 12 that a jury could only consider those statements lies. (See Doc. 28-1 pp. 18, 25-28.) But if a juror
 13 can (wrongfully) consider pages 1-17 of the transcript as *suggesting* that Mr. Johansen requested
 14 an insurance quote, surely that same juror can reasonably consider pages 18-29 of that same
 15 document—where Mr. Johansen *explicitly states* he didn't request a quote and acts
 16 accordingly—as evidence tending to show Mr. Johansen didn't consent. Moreover, the theory
 17 that Mr. Johansen suddenly started lying on page 18 of the transcript and continued to do so
 18 throughout his sworn declaration is nonsensical. In particular, if Mr. Johansen was legitimately
 19 interested in obtaining an insurance quote from Efinancial, why would he spell his own name
 20 wrong and provide a wrong date of birth and an email address of “domiallender@aol.com” that
 21 he has testified under penalty of perjury he has never heard of?

22 Perhaps the clearest example of the magistrate judge's failure to follow the summary
 23 judgment standard was in connection with the string of purported consent data Efinancial
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25 ¹ Moreover, through engaging the caller, Mr. Johansen verified that the caller was in fact from Efinancial.

26 ² Mr. Johansen has not asserted a claim here against Fidelity Life, but the relationship is clearly substantial.
 27 Efinancial's sales representative informed Mr. Johansen that Efinancial is a subsidiary of Fidelity Life, the company
 that “[came] back with the best rate” for Mr. Johansen just so happened to be Fidelity Life, and Efinancial's TCPA
 training materials bear the names of both companies on each page. (See Doc. 28-1 pp. 15, 19-21; Doc. 25-4.)

1 submitted. The IP address tracked to a location over 2,000 miles away from Mr. Johansen and
 2 was owned by a company that has never been Mr. Johansen's ISP, but the magistrate judge
 3 found that a jury could not consider those facts as tending to exculpate Mr. Johansen because IP
 4 addresses “*can be unreliable indicators of physical location.*”³

5 Somehow the “*unreliability*” of Efinancial’s own evidence was held against Mr.
 6 Johansen rather than the other way around.⁴ Rather than find Efinancial hadn’t met its burden,
 7 the magistrate judge held Mr. Johansen to an impossible standard. The magistrate judge found it
 8 significant that Mr. Johansen didn’t submit his browsing history for the date of the website visit
 9 (as if a reason wouldn’t have been found to disbelieve that too) and actually went as far as to
 10 fault him *for not providing an alibi demonstrating it was impossible for him submit an online*
 11 *form* at the date and time in question in an era where the vast majority of Americans have access
 12 to the internet at all times.

13 The magistrate judge found Mr. Johansen was “speculating” that someone else submitted
 14 his information, but he is not speculating. He is 100% sure and swore under penalty of perjury
 15 that he didn’t submit it, therefore by definition someone else did. Again, the magistrate judge
 16 held Mr. Johansen to an impossible standard of explaining who did and why, but he simply
 17 doesn’t know. He knows that Efinancial, its affiliates, its “affinity partners,” its “Vendors” (as in
 18 the “Vendor Source” associated with the website), and any third parties they might use to help
 19 generate web traffic would have an obvious incentive to obtain consumer information and submit
 20 fraudulent requests for insurance quotes, increasing the pool of leads that could be called and
 21 increasing the compensation of entities involved with lead generation, particularly if

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23 ³ A closer look at the case cited by the magistrate judge reveals that this quotation was selective, as the full quotation
 24 reads: “Although IP addresses *alone* can be unreliable indicators of location, they suffice [to give law enforcement
 25 probable cause] when corroborated by the Internet Service Provider, as occurred here.” *See Commonwealth v.*
Molina, 71 N.E.3d 117, 126 (Mass. 2017). Mr. Johansen has corroborated the fact that the IP address at issue
 26 doesn’t track to anywhere near him because he has provided sworn testimony that he does not use Google for an
 ISP. Meanwhile, Efinancial, who has the burden of proof, has done absolutely nothing to connect the IP address at
 issue to Mr. Johansen.

27 ⁴ When it came to drawing strained inferences against Mr. Johansen, the reliability of www.thatsthem.com was
 never questioned.

1 compensation was on a per-lead basis as is commonplace. Mr. Johansen also directed the Court
 2 to evidence that the Google IP address was posted on a list of “public proxies” on a forum related
 3 to technology and computer hacking based in the Philippines the day after the purported website
 4 visit, which is highly suggestive of foul play. (See Doc. 36 p. 13.) Admittedly, Mr. Johansen has
 5 not yet been able to connect the dots and provide a definitive answer as to who submitted his
 6 information—but that was never Mr. Johansen’s burden.

7 **B. Efinancial did not have a “reasonable basis” to call Mr. Johansen.**

8 The magistrate judge then found that *even if Plaintiff had no intention of obtaining an*
 9 *insurance quote* from Efinancial, summary judgment should *still* be granted to Efinancial
 10 because Mr. Johansen’s behavior after the TCPA was already violated was “deceptive.” The
 11 magistrate judge drew an analogy to another case where the court *sua sponte* surmised on a
 12 limited factual record that subsequent calls after the initial call may not have been actionable
 13 because “Mr. Johansen’s deceptive conduct gave NG&E an objectively reasonable basis for
 14 believing that [plaintiff] had established a business relationship with the defendant.”⁵

15 This case is nothing like the *NG&E* case because Mr. Johansen never called Efinancial
 16 and there were *no subsequent calls from Efinancial to him* after Mr. Johansen played along with
 17 the sales pitch. Indeed, Mr. Johansen had previously explicitly requested to be placed on
 18 Efinancial’s DNC list. The magistrate judge’s ruling that “*prior express consent*” can be
 19 provided *after* an unlawful call is made is completely unprecedented and clearly erroneous.⁶

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21 ⁵ Notably, the magistrate judge only cited to a quote from the show cause order, and not to the court’s actual opinion
 22 after the court was provided with the facts—which were that an unrelated telemarketing vendor of the same seller
 23 called him on its own initiative in an attempt to *create* a business relationship, without any knowledge that another
 24 vendor had previously called him or of any so-called “deceptive conduct” on those calls. Once the *NG&E* court was
 25 provided with the facts, all comments suggesting Mr. Johansen engaged in improper behavior ceased.

26 ⁶ In that same paragraph, the magistrate judge stated that “*according to Efinancial*, this is not the first time that
 27 Plaintiff has engaged in this ‘bait-and-switch’ behavior” and proceeded to note that he has filed 39 other cases in the
 last 6 years. There is no suggestion the magistrate judge actually looked into the circumstances of any of those cases
 (besides *NG&E*, which was the only one Efinancial thought was worth citing). Rather, it appears that Efinancial got
 the benefit of an inference that Mr. Johansen has engaged in improper conduct in the past simply because Efinancial
 said so. The far more reasonable, and in fact correct, inference is that the number of cases he has filed without a
 single one being found to be frivolous demonstrates that Mr. Johansen *doesn’t* bring frivolous cases.

1 **C. Efinancial is not entitled to be excused from compliance with the TCPA.**

2 It is undisputed that Efinancial did not meet the explicit requirements to invoke the safe
 3 harbor to the TCPA's Do Not Call provisions. Efinancial acknowledged that it doesn't actually
 4 purchase or access the Do Not Call Registry. The magistrate judge, however, excused Efinancial
 5 from these requirements on the basis of a finding that “[b]ecause Efinancial calls only those
 6 customers who have requested a life insurance quote and consented to be called, it does not need
 7 to access the National DNC Registry.” This finding was erroneous (and based on an argument
 8 raised for the first time on reply) because “always gathering consent” is not a substitute for
 9 compliance with the TCPA’s express safe harbor requirements. There is no provision of the
 10 TCPA that allows for mere “substantial compliance.”⁷

11 This fundamental legal error was compounded by the magistrate judge’s erroneous
 12 finding that the record evidence indisputably established Efinancial’s substantial compliance
 13 with the safe harbor requirements. Despite the fact that the only purported evidence of
 14 consent in the record was almost completely inaccurate, the Court drew an inference in
 15 Efinancial’s favor that the call to Mr. Johansen was a one-time aberration rather than the more
 16 likely case that it is evidence of a systemic problem its consent procedures.⁸

17 Moreover, Efinancial failed to show “written procedures” regarding Efinancial’s consent
 18 gathering practices as required by 47 C.F.R. § 64.1200(c)(2)(i)(A). It provided *no* evidence of
 19 any written procedures as to consent. Efinancial’s written procedures only cover what happens

20 ⁷ See, e.g., *Linscott v. Vector Aero.*, No. CV05-682-HU, 2007 U.S. Dist. LEXIS 55841, at *11 (D. Or. July 27, 2007) (“I do not find plaintiffs’ argument for substantial compliance persuasive. First, no provision in the SSCRA permits the court to excuse the servicemember from providing a copy of his orders to a creditor on the basis of ‘substantial compliance,’ and I decline to rewrite the statute Congress passed.”); *Gorss Motels, Inc. v. AT&T Mobility, LLC*, 490 F. Supp. 3d 476, 490 (D. Conn. 2020) (doubting sufficiency of substantial compliance with TCPA’s requirements and finding even if substantial compliance could be sufficient, the disputed evidentiary record as to the defendant’s purported substantial compliance could not support summary judgment).

21 ⁸ At Efinancial’s request and over Mr. Johansen’s objection, discovery has been bifurcated, so Mr. Johansen has
 22 been blocked from obtaining any more of Efinancial’s purported consent data regarding other consumers. But if
 23 Efinancial’s purported consent gathering practices are going to now be a substitute for compliance with the TCPA’s safe
 24 harbor requirements, then it is imperative that Mr. Johansen be allowed discovery on that purported consent as
 25 to other consumers. If the rest of the purported consent data is filled with inaccurate consumer information, surely
 26 Efinancial is not entitled to summary judgment as to the adequacy of its procedures to ensure TCPA compliance.
 27 However, as the substantial compliance argument was raised for the first time on reply, Plaintiff was precluded from
 rebutting it or identifying this need for additional discovery.

1 after a call is already made. In that way, this case is similar to *In re Dynasty Mortgage, L.L.C.*,
 2 20 FCC Rcd. 4921, 4932 (2005) where the FCC determined a company could not invoke the
 3 TCPA's safe harbor where its written materials only "deal[t] with recording company specific
 4 do-not-call requests and handling calls that it has already made to consumers registered on the
 5 National Do-Not-Call Registry." The FCC further found it significant that: "In fact, rather than
 6 presenting a plan that seeks to avoid making calls to telephone numbers contained on the
 7 National Registry, the script instead addresses a scenario in which Dynasty calls such a number."
 8 *Id.* at 4931.

9 Here, not only do Efinancial's training materials "address a scenario" where it calls a
 10 consumer that hadn't consented, Efinancial actually trains its sales representatives that "*Do Not*
 11 *Call requests are a common occurrence.*" (See Doc. 25-4 p. 12.) This is inconsistent with
 12 Efinancial's unsupported representation that it always gathers consent. Moreover, as in *Dynasty*,
 13 Efinancial has provided no evidence, written or otherwise, of "any type of ongoing compliance
 14 monitoring" with respect to gathering consent. See *Dynasty*, 20 FCC Rcd. at 4931.

15 Likewise, the magistrate judge erroneously concluded that Efinancial had proved an
 16 "error," a distinct prerequisite to invoking the safe harbor. The magistrate judge acknowledged
 17 that the FCC has instructed that "[a]n error claim should be supported by evidence showing that
 18 otherwise unlawful telephone solicitations were made unintentionally and detailing any
 19 procedural breakdowns that led to such calls, as well as the steps that the seller has taken to
 20 minimize future errors." *Id.* at 4929. Yet the magistrate judge brushed aside the fact that none of
 21 this was shown. Indeed, Efinancial hasn't even explained how the "error" could have occurred
 22 and apparently still believes there *wasn't any error*. The magistrate judge equated "error" to
 23 "mistake." But as explained above, on this record—where all indications are there are serious
 24 problems with Efinancial's consent gathering practices and where Mr. Johansen had already
 25 explicitly told Efinancial not to call him—the magistrate judge was wrong to conclude,
 26 particularly as a matter of law, that Efinancial was "understandably mistaken in its belief" that
 27 Mr. Johansen consented.

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RESPECTFULLY SUBMITTED AND DATED this 28th day of June, 2021.

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CERTIFICATE OF SERVICE

I, Samuel J. Strauss, hereby certify that on June 28, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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